

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRIMINAL NO. 22-213 (ADC)(HRV)

[1] CARLOS MANUEL COTTO-CRUZ,

Defendant.

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

I. Introduction

Defendant Carlos Manuel Cotto-Cruz (hereinafter “Cotto-Cruz” or “defendant”) has been charged in a six-count indictment with conspiracy to possess with intent to distribute controlled substances, aiding and abetting others in the possession with intent to distribute controlled substances, and possession of firearms in furtherance of a drug-trafficking crime, all in violation of 21 U.S.C. §§ 841(a)(1), 860 and 18 U.S.C. § 924(c). (Docket No. 3).

Pending before the court is the motion to suppress filed by the defendant on October 30, 2023. (Docket No. 1391). The defendant moves to suppress the physical evidence seized from apartment E-301, Mar Building, Hillside Village apartment complex in Rio Grande, Puerto Rico. He argues that law-enforcement agents unlawfully entered the apartment in violation of his rights under the Fourth Amendment. The

1 government opposed (Docket No. 1443) and Cotto-Cruz replied. (Docket No. 1467). The
2 matter was referred to me by the presiding District Judge for report and
3 recommendation. (Docket No. 1660). I held an evidentiary hearing on May 22, 2024.
4 (Docket No. 1772). The parties submitted post-hearing memoranda on May 31, 2024.
5 (Docket Nos. 1778, 1780).
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7 For the reasons set forth below, I recommend that the motion to suppress be
8 **GRANTED.**

9 **II. Findings of Fact¹**

10 **A. Testimony of Cotto-Cruz - Standing**

11 Cotto-Cruz rented Apartment E-301 located at building Mar in the Hillside Village
12 apartment complex, through a third party using the Airbnb online application.
13 Ineyshali², an acquaintance, rented the apartment under her name. The length of the
14 rental was from September 2020 until December 2020. He paid approximately \$3,000
15 to \$3,200 for the rental in cash. Cotto-Cruz gave the money to Ineyshali, and then he
16 received the keys to the apartment and a beeper to access the apartment complex.
17 During the length of the rental, Cotto-Cruz had control of the keys and the apartment.
18 At the time, Cotto-Cruz had another apartment rented where he would also stay.
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24 ¹ With the input of the parties, I bifurcated the hearing noting that the defendant had the burden to show
25 that he had a legitimate expectation of privacy in the apartment in question. The defense presented the
26 testimony of Cotto-Cruz.

27 ² The correct spelling of the name was not clarified at the hearing. I am somewhat guessing the spelling
28 based on how it sounded phonetically. No last name was provided either.

1 Building Mar was described as “whiteish” light gray in color. The apartment has
2 parking spaces in front of the building across the street leading to a parking lot.
3 Apartment E-301 had two parking spots next to each other. From the apartment to the
4 parking lot one has to go down the stairs, and through a little “bridge” since the complex
5 is divided into buildings identified with letters, A, B, C, D and so forth. The defense
6 introduced Exhibits A through H, photographs depicting the apartment complex,
7 building E in particular, a far-away view of the hallway leading to apartment E-301, and
8 the parking lot. Exhibits E and E-1 specifically show the parking spots assigned to
9 apartment E-301. Exhibit F depicts at least four parking spots assigned to apartments in
10 building F. These parking spaces are to the far right after the building E spots if one looks
11 from the building to the parking lot.
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14 On cross-examination, Cotto-Cruz stated that he asked Ineyshali to rent the
15 apartment in her name as a favor because she had an Airbnb account. She was the one
16 who gave Cotto-Cruz the keys of the apartment and the beeper. Cotto-Cruz admitted that
17 not putting the rental agreement under his name had to do with the fact that he was a
18 fugitive at the time.
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20 Cotto-Cruz did not know who the actual owner of the apartment was. When asked
21 if he knew whether the owner of the apartment was aware that Cotto-Cruz was staying
22 there, and not Ineyshali, he responded that on one occasion, a man that he described as
23 “American” showed up at the apartment. Cotto-Cruz was not sure if he was the owner or
24 someone in charge of the apartment. The man wanted to make sure he was happy with
25 the property and if everything was ok. For the duration of the lease agreement, no one
26 told Cotto-Cruz that he had to vacate the apartment. Cotto-Cruz did not have to fill out
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1 any paperwork with the security booth. He admitted that the only evidence of him being
2 authorized to be at the apartment was his testimony and denied that the true purpose of
3 renting the apartment was to store drugs and firearms.

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5 **B. Testimony of PRPB Agent Miguel Morales-Cotto³**

6 Miguel Morales-Cotto (hereinafter “agent Morales-Cotto”) has been a Puerto Rico
7 Police Officer for 14 years. He is currently assigned to the criminal intelligence unit of
8 the Caguas area. He has served in that unit for 11 years. His duties include investigating
9 criminal organizations and supporting the homicide and major crimes divisions.

10 On December 10, 2020, agent Morales-Cotto was working in Caguas at the
11 intelligence division. His involvement in an incident at the Hillside Village apartment
12 complex began a few days prior, on December 8. That day (December 8), Mr. Lino Acosta
13 (“Acosta”) was arrested for being in possession of a vehicle alleged to have a connection
14 with a murder that took place on December 4, 2020, in San Lorenzo, Puerto Rico. Prior
15 to December 8, 2020, agent Morales-Cotto had not worked with Acosta and Acosta had
16 not provided information to the police or served as an informant.

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19 Following his arrest on December 8, 2020, Acosta made some admissions and
20 spoke about other persons that allegedly participated with him in the December 4, 2020,
21 murder. Acosta specifically mentioned Cotto-Cruz as being one of the participants in
22 said murder and offered the agents to take them to where Cotto-Cruz was staying. This
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27 ³ Agent Morales-Cotto did not take any notes to memorialize any aspect of his investigation or facts
28 narrated that were the subject of his testimony at the suppression hearing.

1 information was notified to a supervisor who established a work plan for agents to take
2 Acosta to the area so that he could show them. The plan included the supervisor and
3 another agent to transport Acosta to the area in one car. Agent Morales-Cotto and two
4 other officers went in a separate unmarked vehicle to the Hillside Village in Rio Grande.
5 This happened on December 10, 2020. In addition to the information Acosta provided
6 the police, agent Morales-Cotto knew that there was an outstanding federal arrest
7 warrant for Cotto-Cruz due to a probation violation. Prior to going to Rio Grande for the
8 first time, neither agent Morales-Cotto nor any of his fellow officers called the United
9 States Marshal service.
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12 Once the agents, along with Acosta, reached the area of the Hillside Village
13 apartments, they proceeded to look for a red Ford Raptor. Acosta had informed the
14 agents that Cotto-Cruz drove a Ford Raptor and that if that vehicle was parked there in
15 the parking lot, Cotto-Cruz would be there. Acosta did not provide the police a license
16 plate number of the Ford Raptor and agent Morales-Cotto never saw Cotto-Cruz driving
17 or inside the Ford Raptor. Further, Acosta never provided a specific apartment number
18 where Cotto-Cruz was staying at.
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20 Agent Morales-Cotto accessed the apartment complex by identifying himself as a
21 police officer with the security guard. It was approximately 3:30 p.m. when agents
22 entered the apartment complex. Once inside, he drove his vehicle through the parking
23 lot towards the recreational area. As he did that, the agent was able to observe a red Ford
24 Raptor in the parking lot on the left side. Exhibit 2 is a photograph of the Ford Raptor
25 taken from outside of the apartment complex. As the agent turned the vehicle around in
26 the recreational area, he dropped off one of his fellow officers so that said officer could
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1 check the license plate of the Ford Raptor and to check if the parking space had the
2 apartment number. Then, he drove towards the entrance of the complex to wait for his
3 fellow officer.

4 While waiting, agent Morales-Cotto observed a gentleman get out of a white
5 Toyota 4Runner. The agent was able to tell that it was Cotto-Cruz because he had
6 previously intervened with him on or around 2018. Cotto-Cruz was by himself in the
7 parking lot. However, citing security concerns given the fact that a fellow officer was
8 walking through the apartment complex, and that Acosta was just outside the complex
9 with another officer, the agents decided not to arrest Cotto-Cruz at that time. Agent
10 Morales-Cotto notified his supervisor and waited for his fellow officer to walk over to the
11 vehicle and board the same to leave. The agents were not able to check the license plate
12 nor verify the apartment number in the parking spot where the Ford Raptor was parked.
13 Again, agent Morales-Cotto asserted that they had to quickly leave the area due to safety
14 concerns. Neither agent Morales-Cotto nor his partner who was sitting with him in the
15 car took a picture or video of Cotto-Cruz.

16 Agent Morales-Cotto saw Cotto-Cruz enter the building right in front of the
17 parking lot where the Ford Raptor was parked. **He did not see him enter or exiting**
18 **any specific apartment.** He also admitted that the entrance gives access to “several”
19 apartments, at least eight.

20 The agents then left the apartment complex. Agent Morales-Cotto communicated
21 to his supervisor that he had learned from an interview of the security guard of the
22 apartment complex that the apartment where Cotto-Cruz was staying at was apartment
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1 E-301.⁴ The supervisor instructed that since they already had the location, they were
2 going to return Acosta to jail so as to not expose him and then go back to the apartment
3 complex to conduct surveillance if necessary, come up with a work plan to investigate
4 further, and arrest Cotto-Cruz.

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6 Agent Morales-Cotto returned to the Hillside Village apartment complex that
7 same day at approximately between 7:15 and 7:30 p.m. to effectuate the arrest. No
8 additional surveillance was to be conducted because the determination was already made
9 that with the information obtained from the investigation, “Cotto-Cruz was at apartment
10 E-301.” The operation was to be executed by PRPB’s criminal intelligence unit together
11 with U.S. Marshals. Shortly after arriving to the area and acting upon information
12 provided by Acosta that Cotto-Cruz would have a lookout posted at the entrance of the
13 complex, agent Morales-Cotto observed that there was a Toyota Sequoia parked outside
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18 ⁴ At the hearing, I sustained several hearsay objections by the defense regarding information provided by
19 the security guard of the apartment complex that Cotto-Cruz was staying at apartment E-301. The
20 government contended that statements by the security guard were not offered for the truth of the matter
21 asserted but rather for the effect on the listener. Over the defendant’s objection, I allowed a statement by
22 the agent to the effect that he learned about the apartment number through the investigation. Later, on
23 re-direct, the agent testified that it was from his interview of the security guard, he came to the information
24 that Cotto-Cruz was staying at apartment E-301. This time the defendant did not object. The objection
25 came once the prosecutor requested specifics as to what was said by the security guard. I again sustained
26 the hearsay objection. At the hearing, the government cited *United States v. Bailey*, 270 F.3d 83, 87 (1st
27 Cir. 2001) for the proposition that out-of-court statements offered not for their truth but only “for context,
28 such as the effect of the words spoken on the listener, are not hearsay.” However, *Bailey* is distinguishable
because, here, the statements by the security guard were not offered for the effect on agent Morales-Cotto,
but for their truth. It must be kept in mind that one of the main issues in this case is whether Cotto-Cruz
was in fact a resident of apartment E-301. The only reason that agents went straight to apartment E-301
to execute the arrest of Cotto-Cruz is if the statement by the security guard that he lived there was accepted
as true. The government cannot have it both ways. It cannot assert that the security guard’s statement
gave the agents a reasonable belief that Cotto-Cruz lived at apartment E-301 while claiming that any such
statement was not offered for its truth. See *United States v. Cabrera-Rivera*, 583 F.3d 26, 34-36 (1st Cir.
2009).

1 of the complex. Exhibit 1-4 depicts the Sequoia. Without more, the agent proceeded to
2 intervene with the vehicle. Mr. Carlos Santos was detained, and the vehicle was seized.
3 The agent did not see any weapons or drugs, nor anyone committing a crime in
4 connection with the Sequoia. He did not have probable cause to arrest. After the seizure
5 of the Sequoia, Mr. Carlos Santos consented to a search of the same. A pistol, magazines,
6 rounds of ammunition, controlled substances and a radio scanner were seized from the
7 vehicle.
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9 In addition to intervening with the occupant of the Toyota Sequoia, agent
10 Morales-Cotto seized the Ford Raptor that was parked inside the apartment complex.
11 Exhibit 81 is a photograph of the Ford Raptor. A k-9 was passed around the vehicle and
12 marked positive. The vehicle was then sealed and taken to the Caguas precinct. Even
13 though the operation was only to attempt to arrest Cotto-Cruz, the police took a k-9 and
14 passed it around the Ford Raptor. Agents did not seek to obtain a search warrant for the
15 vehicle with the information available, or for the apartment for that matter, while
16 admitting that there were state prosecutors available to assist in applying for search
17 warrants.
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20 The seizure of the Ford Raptor concluded agent Morales-Cotto's participation in
21 the operation that night. Three individuals were arrested. Cotto-Cruz was not one of
22 them.
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24 **C. Testimony of Deputy United States Marshal Abelardo Conty**

25 Deputy United States Marshal Abelardo Conty-Gonzalez (hereinafter "DUSM
26 Conty") has worked in that capacity for six years. He is formally assigned to court
27 operations but has assisted in other tasks such as cellblock operations, fugitive
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1 operations, and judicial security. Fugitive operations at the marshal service includes
2 investigation, searching for, and apprehending fugitives.

3 DUSM Conty participated in the fugitive operation of December 10, 2020, seeking
4 to arrest Cotto-Cruz. He was specifically assigned to the tactical entry team. As the
5 tactical team comprised of five not more than six operators approached the door of the
6 apartment, the breacher knocked and announced the presence of law enforcement. Prior
7 to entry, DUSM Conty heard noises from inside described by him as a “scuffle”, “people
8 running”, and “loud noises.” Because the priority in conducting entry into a residence is
9 the safety of the officers, a sweep was conducted immediately after entry looking for
10 human bodies. A sweep looks only into areas where a person could hide. DUSM Conty
11 could tell that someone had opened the door to, and jumped from, the balcony. He did
12 not personally see individuals jumping out.

13 After conducting the security sweep, DUSM Conty observed contraband in plain
14 view. Specifically, he saw rounds of ammunition, firearms, and what appeared to be
15 controlled substances. Exhibits 10, 15, 59, 65, 73, 74 and 75 were admitted into evidence
16 depicting some of the items observed by DUSM Coty in plain view. After the security
17 sweep was conducted, the tactical entry team’s job is done. The other law enforcement
18 agency that was going to take charge of the scene, in this case Puerto Rico Police, was
19 allowed in. DUSM Conty saw some people detained outside of the apartment after he
20 was finished with the security sweep. He did not see Cotto-Cruz in the parking lot, exiting
21 the Ford Raptor, entering or leaving the apartment. Cotto-Cruz was not found inside the
22 apartment either.
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D. Testimony of PRPB Sergeant Maritere Rivera-Rivera

Sergeant Maritere Rivera-Rivera (hereinafter “Sgt. Rivera”) works for the Puerto Rico Police Bureau currently at the Caguas intelligence unit. She has been a police officer since 2010 and a sergeant since last year. Her duties as agent and supervisor include identifying and investigating criminal organizations.

On December 10, 2020, Sgt. Rivera worked at the same office—Caguas intelligence. She is familiar with Cotto-Cruz because she had previously seen him on more than two occasions back in 2013 or 2014. She identified him in open court. Sgt. Rivera was at the Hillside Village apartment complex in Rio Grande on December 10, 2020. She was there as part of the team to execute the arrest warrant against Cotto-Cruz. Her role was to provide support and conduct surveillance, if necessary. Sgt. Rivera entered the apartment after the U.S. Marshal team cleared it and informed her that there was evidence observed in plain view that needed to be seized.⁵

Sgt. Rivera entered the apartment together with technical services. She briefly described the layout of the apartment and what she observed as she entered and walked around the apartment. She saw controlled substances, firearms, rounds of ammunition, and paraphernalia. Exhibits 8 through 83 were admitted into evidence. These are photographs of the contraband as it was found inside apartment E-301. Sgt. Rivera

⁵ Sgt. Rivera testified on cross examination that before “impacting” the apartment, Sgt. Luis Rodriguez told her that Cotto-Cruz had been seen entering and leaving apartment E-301. This is completely inconsistent with the evidence received at the hearing and raises red flags about the nature of the investigation conducted and the information that was shared with the law-enforcement agents participating in the operative.

1 testified extensively as to what each of the photographs was depicting. She provided
2 details as to whether the images showed the items as they were found or whether she had
3 moved them or manipulated them for purposes of taking the photographs. It became
4 evident that some items found inside closed containers were revealed after Sgt. Rivera
5 removed the lids and opened said containers.
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7 **III. Applicable Law and Discussion**

8 The defendant contends, first, that he had a legitimate expectation of privacy in
9 apartment E-301. Cotto-Cruz then argues that suppression is warranted because law-
10 enforcement agents had no basis to believe that he resided at apartment E-301 or that he
11 was there at the time they entered the apartment to execute an arrest warrant issued
12 against him.
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14 The government ripostes that suppression of all the contraband observed in plain
15 view at the apartment should be denied because the agents were lawfully present on the
16 premises. According to the government, the information received from the cooperator
17 as well as the investigation conducted was sufficient to establish that the agents had a
18 reasonable belief that Cotto-Cruz lived at apartment E-301 and was home at the time of
19 their entry. Also, in its post-hearing memorandum, the government reiterated what it
20 said at the conclusion of the evidentiary hearing: that items found in containers with
21 close lids that were opened by the police should be excluded. The government referred
22 to an attachment listing said items and the corresponding exhibit number. However, no
23 attachment was included. It does not matter since I am recommending suppression of
24 all the evidence seized from the apartment. *United States v. Graham*, 553 F.3d 6, 12 (1st
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1 Cir. 2009)(holding that if the initial entry is “unjustified the evidence discovered
2 subsequent to it must be suppressed.”).

3 **A. Defendant’s Expectation of privacy in apartment E-301**

4 When moving to suppress evidence, a defendant “carries the burden of
5 establishing that he had a reasonable expectation of privacy with respect to the area
6 searched or . . . the items seized.” *United States v. Lipscomb*, 539 F.3d 32, 35-36 (1st Cir.
7 2008)(citing *United States v. Salvucci*, 448 U.S. 83, 91-92, 100 S. Ct. 2547, 65 L. Ed. 2d
8 619 (1980)). This threshold standing requirement is something that a defendant must
9 establish before the court engages in any substantive Fourth Amendment analysis.
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11 *United States v. Lewis*, 40 F.3d 1325, 1333 (1st Cir. 1994). To carry this burden,
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13 a defendant must demonstrate that he personally has
14 an expectation of privacy in the place searched, and that his
15 expectation is reasonable; i.e., one that has a source outside of the
16 Fourth Amendment, either by reference to concepts of real or
personal property law or to understandings that are recognized
and permitted by society.

17 *United States v. Samboy*, 433 F.3d 154, 161 (1st Cir. 2005)(quoting *Minnesota v. Carter*,
18 525 U.S. 83, 88. 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998)). Put differently, the court must
19 determine “whether or not the individual thought of the place (or the article) as a private
20 one, and treated it as such” and “whether the individual’s expectation of confidentiality
21 was justifiable under the circumstances.” *United States v. Aguirre*, 839 F.3d 854, 857
22 (1st Cir. 1988). The following factors are relevant: “ownership, possession, and/or
23 control; historical use of the property searched or the thing seized; ability to regulate
24 access; [and] the totality of the surrounding circumstances.” *Id.* at 856-57.
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1 I find that Cotto-Cruz submitted sufficient evidence to meet his burden of showing
2 a legitimate expectation of privacy in apartment E-301. He testified he asked an
3 acquaintance to rent the apartment as a favor using the Airbnb application. Cotto-Cruz
4 gave Ineyshali cash to pay for the rental, and she rented the apartment under her name.
5 Once rented, Cotto-Cruz received the keys and a beeper. He had control of the keys and
6 the beeper. When shown pictures, he could identify the layout of the apartment complex
7 and apartment E-301, thus showing familiarity. Even though he stayed at other places
8 during this time due to his fugitive status, Cotto-Cruz had control over and stayed at the
9 apartment for approximately three months. Cotto-Cruz himself had an interaction with
10 a person he identified as either the owner or person in charge of the apartment. That
11 person never asked Cotto-Cruz to vacate the premises presumably knowing that the
12 apartment had been rented under the name of a female.
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15 In *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990), the
16 Supreme Court held that a defendant wanted in connection with a murder had a
17 reasonable expectation of privacy in the house where he was hiding because he was an
18 overnight guest. “It is not necessary that the defendant own the home or be a signatory
19 on a lease or rental agreement; even an overnight guest can have a Fourth Amendment
20 right when he resides at a home ‘with the permission of his host, who is willing to share
21 his house and his privacy with his guest.’” *United States v. Ray*, 541 F. Supp. 3d 355, 380
22 (S.D.N.Y. 2021)(quoting *Minnesota v. Olson*, 495 U.S. at 99); see also *United States v.*
23 *Torres-Viruet*, 330 F. Supp. 3d 708, 717 (D.P.R. 2018)(Delgado-Colon, J).
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26 In any event, the government did not to address the sufficiency of the evidence
27 regarding standing in its post-hearing memorandum focusing only on the merits of its
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1 argument regarding the lawfulness of the warrantless entry. By doing so, the government
2 has abandoned its claim that Cotto-Cruz lacks standing. Even if the claim had not been
3 abandoned, for the reasons outlined above, I would still conclude that the defendant has
4 carried his burden to show he has standing. Moreover, under a very similar factual
5 scenario, a magistrate judge of this district has recommended that Cotto-Cruz be found
6 to have a reasonable expectation of privacy in a residence where he was staying
7 notwithstanding his fugitive status, the contraband discovered, and the rental agreement
8 being under the name of a third person. *See United States v. Cotto-Cruz*, Criminal No.
9 21-320 (ADC/BJM), 2023 WL 4247503, 2023 U.S. Dist. LEXIS 113752 (D.P.R. June 29,
10 2023). I likewise recommend that Cotto-Cruz be found to have standing to challenge the
11 lawfulness of the entry into apartment E-301.
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14 **B. Warrantless entry into the apartment**

15 The Fourth Amendment protects against unreasonable searches and seizures. U.S.
16 Const. amend IV. “It is a basic principle of Fourth Amendment law that searches and
17 seizures inside a home without a warrant are presumptively unreasonable.” *Payton v.*
18 *New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). And “[o]n a motion
19 to suppress evidence seized based on a warrantless search, the presumption favors the
20 defendant, and it is the government’s burden to demonstrate the legitimacy of the search.”
21 *United States v. Delgado-Perez*, 867 F.3d 244, 250 (1st Cir. 2017)(quoting *United States*
22 *v. Winston*, 444 F.3d 115, 123-24 (1st Cir. 2006)).
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25 Relevantly, it has been held that police officers attempting to execute an arrest
26 warrant have “limited authority to enter a dwelling in which the suspect lives when there
27 is reason to believe that the suspect is within.” *Payton v. New York*, 445 U.S. at 603.
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1 Even if the officers are mistaken as to the subject's residence, "no Fourth Amendment
2 violation occurs if the officers enter a third party's home under the reasonable belief that
3 the target named in the arrest warrant **resides** at the dwelling in question and **will be**
4 **present** at the time of entry." *Solis-Alarcon v. United States*, 662 F.3d 577, 580 (1st Cir.
5 2011)(citing *United States v. Werra*, 638 F.3d 326, 336-37 (1st Cir. 2011) and *United*
6 *States v. Graham*, 553 F.3d at 12-13)(emphasis ours).

8 The First Circuit has not explicitly decided whether the standard to be applied is
9 probable cause or reasonable belief. *United States v. Young*, 835 F.3d 13, 19 n.6 (1st Cir.
10 2016)(quoting *United States v. Werra*, 638 F.3d at 337)(noting that the First Circuit has
11 implicitly accepted the majority view adopting the reasonable belief standard and
12 treating it as less stringent than probable cause.); see also *United States v. Hamilton*,
13 819 F.3d 503, 506 n. 5 (1st Cir. 2016). I must therefore look to other circuits for a
14 definition of the reasonable belief standard. "[R]easonable belief is not a finely-tuned
15 standard" but "can only be ascertained through a weighing of the facts in the record, as
16 it is a fluid concept that takes its substantive content from the particular contexts in
17 which the standard is being assessed." *United States v. Thomas*, 429 F.3d 282, 286, 368
18 U.S. App. D.C. 285 (D.C. Cir. 2005)(quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.
19 Ct. 2317, 76 L. Ed. 2d 257 (1983)). While the degree of certainty required for reasonable
20 belief cannot be defined with precision, some guidance could be obtained from case law
21 holding that the standard "requires more than a hunch as to presence, but less than a
22 probability." *United States v. Bohannon*, 824 F.3d 242, 255 (2d Cir. 2016). To satisfy
23 this standard, the officers need only "have a basis for a reasonable belief as to the
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operative facts, not that they acquire all available information or that those facts exist.”
United States v. Lovelock, 170 F.3d 339, 344 (2d Cir. 1999).

Against this backdrop, I tackle the controversy at hand. I must determine whether the police had a reasonable belief, as defined above, that Cotto-Cruz (1) resided at apartment E-301, Hillside Village in Rio Grande, and (2) was there on December 10, 2020, at approximately 7:15 p.m. After careful consideration of the evidence presented at the suppression hearing and the applicable law, I must conclude that the government has failed on both prongs of the inquiry.

1. Residence

At the outset, it is undisputed that there was an outstanding arrest warrant against Cotto-Cruz for violation of supervised release and that he had been a fugitive for quite some time.⁶ Through the testimony of the government’s only witness linking Cotto-Cruz to the apartment—agent Morales-Cotto—it was established that the police acted upon the following information when they forced their entry into apartment E-301.

On December 8, 2020, Acosta was arrested for his alleged connection to a murder that occurred in San Lorenzo four days earlier. Acosta apparently provided post-arrest statements that incriminated himself and others, including Cotto-Cruz, in the San Lorenzo murder. He agreed to cooperate with the authorities and offered to take the

⁶ I take judicial notice of Criminal No. 15-244 (ADC). From the docket of that case, it is apparent that the arrest warrant against Cotto-Cruz was issued on April 5, 2019. Criminal No. 15-244 (ADC), Docket No. 232. Thus, at the time of the events in this case, Cotto-Cruz had been at large for more than 20 months.

1 agents to where Cotto-Cruz was “staying.” Note that Acosta did not offer to take the
2 agents to the “residence” or “home” of Cotto-Cruz. Agent Morales-Cotto was not present
3 during the time Acosta provided these statements. They were relayed to him by others.
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5 A work plan was established to go to the place where Acosta said Cotto-Cruz was
6 staying. The plan included transporting Acosta to the area; said plan was executed on
7 December 10, 2020, in the afternoon hours. At approximately 3 p.m., Acosta directed
8 the agents to the Hillside Village apartments and the only other information provided, at
9 least as per the testimony presented at the hearing, was that Cotto-Cruz drove a red Ford
10 Raptor. Acosta told the agents to look for the Ford Raptor because if it was parked at the
11 apartment complex, Cotto-Cruz “would be there.” That is the extent of the information
12 provided by Acosta, a murder suspect turned cooperator, that had not previously
13 provided information to the agents. No evidence was ever introduced as to the basis for
14 Acosta’s knowledge about the location of Cotto-Cruz. And, importantly, there was no
15 evidence presented that Acosta provided a specific apartment number to the agents.⁷ Cf.
16 *United States v. Gay*, 240 F.3d 1222, 1227 (10th Cir. 2001)(finding objective reasonable
17 belief where informant knew target was involved in criminal activity, told the officers
18 location based on personal knowledge, accompanied officers to the residence and
19 pointed at the dwelling).
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25 ⁷ The government represented in its opposition to the defendant’s motion to suppress that “a witness came
26 forward” and identified the location including “Apartment E-301.” (Docket No. 1443 at 3). Unless the
27 government was referring to a different witness than Acosta, the evidence at the hearing did not support
28 this factual representation.

1 Three agents, including Morales-Cotto, entered the apartment complex in an
2 unmarked vehicle. Acosta remained outside of the apartment complex accompanied by
3 two additional police officers. A red Ford Raptor was parked in the parking lot of the
4 apartment complex. But agent Morales-Cotto did not have at that time any information
5 connecting Cotto-Cruz to the Ford Raptor aside from Acosta's statement. An unidentified
6 agent was dropped off to attempt to get the license plate of the Raptor and to attempt to
7 see the apartment number of the spot in which it was parked. Neither of these tasks were
8 successful because suddenly there was a Cotto-Cruz sighting. According to agent
9 Morales-Cotto, he saw Cotto-Cruz step out of a white Toyota 4Runner. Agent Morales-
10 Cotto alleges to have intervened with Cotto-Cruz back in 2018 (although he was a bit
11 equivocal about the year); that is how he was able to identify the defendant. Cotto-Cruz
12 was by himself and not armed. No information was provided as to what happened with
13 the white 4Runner after Cotto-Cruz stepped out of it. I must note that assuming agent
14 Morales-Cotto did in fact see Cotto-Cruz, then the information provided by Acosta
15 suggesting that if the Raptor⁸ was parked there, Cotto-Cruz "would be there", turned out
16 to be wrong as he was seen arriving in a different vehicle.
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20 The agents were then instructed to retreat because of security concerns since they
21 had Acosta outside. Aside from the alleged security concerns, there appeared to be
22 nothing impeding the agents from attempting to arrest Cotto-Cruz. I am unable to
23

24
25
26 ⁸ The government similarly represented in its opposition that within a few minutes of seeing Cotto-Cruz,
27 the Ford Raptor was observed leaving the apartment complex. (Docket No. 1443 at 4). This is not what
28 the evidence showed at the suppression hearing. There was no mention by agent Morales-Cotto, or anyone
else, of the Raptor leaving the Hillside Village apartment complex at that time.

1 understand how an apprehension attempt by three armed agents against an unarmed
2 target, compromised the safety of a cooperator sitting in a vehicle outside of the complex
3 and under the custody of other law enforcement agents. In any case, this is not
4 dispositive here because my job is to assess the lawfulness of the entry.
5

6 None of the agents were able to snap a picture or video of Cotto-Cruz claiming
7 that they did not want to alert defendant of their presence. The mission to get the license
8 number of the Raptor as well as the parking spot number had to be aborted. While
9 waiting for his partner to board the vehicle, Agent Morales-Cotto was somehow able to
10 see Cotto-Cruz access the entryway of building E. He did not see Cotto-Cruz enter (or
11 leave) any of the at least 8 apartments in that building.
12

13 Notwithstanding the cited security concerns and the need not to alert Cotto-Cruz
14 of their presence, agent Morales-Cruz had a sufficient opportunity to interview the
15 security guard. It was the security guard who told the agents that Cotto-Cruz was staying
16 at apartment E-301. There was no further surveillance or investigation conducted to
17 corroborate that Cotto-Cruz actually lived at Apartment E-301. With the scant
18 information gathered, the police decided that they had all they needed to go back to the
19 apartment complex and enter apartment E-301. Over four hours elapsed between the
20 first visit to the Hillside Village and the time agents entered the apartment. There was
21 no explanation provided as to why more surveillance could not be conducted to further
22 corroborate the information, nor why a search warrant could not be obtained during that
23 time.
24
25

26 I understand that there was a sense of urgency to arrest a fugitive presumed to be
27 armed and dangerous. However, two days elapsed between the time Acosta provided
28

1 post-arrest statements and the time the agents got around to go to the area. There was
2 no evidence presented that the agents did anything during those two days to conduct
3 surveillance or corroborate the information. It is worth noting again that all Acosta
4 provided was a statement that Cotto-Cruz was staying at Hillside Village (no apartment
5 number), that he drove a red Ford Raptor, and that if the Raptor was parked at the
6 apartment complex, Cotto-Cruz would be there. Granted, there was a red Ford Raptor
7 parked at the apartment complex. In that sense, I find that there was some corroboration
8 of Acosta's statements. But then he went 0 for 2 with respect to Cotto-Cruz "driving" the
9 Ford Raptor and being there "if the Raptor was there."
10

11
12 Now, I am mindful that I did not allow evidence of details provided by the security
13 guard that would have tended to further corroborate Acosta's information. The record
14 only contains a statement by agent Morales-Cotto that upon interviewing him, the
15 security guard supplied the apartment number where Cotto-Cruz was staying. Again, the
16 basis of such knowledge is unclear because I prevented the government from bringing in
17 this information through unreliable hearsay. Specifics such as how did the security guard
18 identified Cotto-Cruz as the current resident of E-301 or as driver of the Raptor did not
19 make it into the record. The unreliability of this evidence was further highlighted by the
20 fact that agent Morales-Cotto did not document the interview and only vaguely stated
21 that he had written down the identity of the security guard somewhere but could not
22 recall his name or identifying information. Thus, the government's description in its
23 post-hearing brief of the security guard as a reliable source is incorrect. Moreover, I was
24 not made aware of any reason why the security guard could not be called as a witness.
25
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28

1 In view of the above, I find that the evidence was insufficient to establish a
2 reasonable belief that Cotto-Cruz was a resident of apartment E-301. At most, putting
3 together the information provided by Acosta and the fact that the agent saw Cotto-Cruz
4 at the apartment complex entering building E, the government has established that
5 agents had a reasonable belief that he resided in one of the at least 8 apartments in that
6 building. I recognize that this is a close question because (1) the reasonable belief
7 standard is relatively low and (2) the apartment number learned through “the
8 investigation” could have provided the necessary level of belief that the defendant
9 resided at the apartment at issue. *See Graham*, 553 F.3d at 13 (the police need not possess
10 rock-solid indicators of residence). Nevertheless, I reiterate my finding because in this
11 case, the quantity and quality of the evidence required that the officers did more to
12 corroborate. *United States v. Brinkley*, 980 F.3d 377, 386 (4th Cir. 2020)(“The quantity
13 and quality of information known to officers bear on whether they have [reasonable
14 belief], with less reliable information requiring more corroboration.”) Here, the
15 information about residence was sparse (Acosta and a few minutes investigation at the
16 scene), and unreliable (hearsay from the security guard).

20 **2. Presence**

21 Even if the evidence was sufficient to hold that the agents reasonably believed that
22 Cotto-Cruz resided at apartment E-301, the evidence falls short of establishing they had
23 a reasonable belief that he was there at the time they entered the apartment. First, the
24 only evidence tending to corroborate Cotto-Cruz’ presence is information linking the
25 Ford Raptor to him. *See Werra*, 638 F.3d at 339 (citing *Valdez v. McPheters*, 172 F.3d
26 1220, 1226 (10th Cir. 1999))(the presence of a car associated with the suspect is a type of
27

1 circumstantial evidence that suggests the individual named in the arrest warrant is
2 present.). But the brief investigation conducted by the agents revealed nothing that could
3 lead me to conclude that the vehicle was owned or used by Cotto-Cruz. Other than
4 Acosta's uncorroborated statement, there was no admissible evidence presented to show
5 a connection between the defendant and the Raptor.
6

7 Second, if in fact agent Morales-Cotto saw Cotto-Cruz in a different vehicle, as was
8 his testimony, then Acosta was wrong when he stated that if the Ford Raptor was parked
9 at the apartment complex, Cotto-Cruz would be there. Therefore, observing the Ford
10 Raptor parked at the apartment complex when the agents returned the night of
11 December 10, 2020, cannot serve as a basis for establishing a reasonable belief of
12 presence. My finding is further confirmed by the fact—although I realize this is post-hoc
13 rationalization—that upon entry, Cotto-Cruz was not found at the apartment even
14 though the Ford Raptor was there.
15

16 And here, similar to *Young* and *Werra*, the police made no efforts to confirm the
17 defendant's presence at the apartment before entering. *Young*, 835 F.3d at 23; *Werra*,
18 638 F.3d at 338. There was nothing preventing the agents from conducting additional
19 surveillance or employing other investigative techniques to confirm presence. While the
20 question of residence is a close one, the issue of presence in my opinion, is not close at
21 all. Suppression is warranted.
22

23 **IV. Conclusion**

24 In the haste for apprehending a fugitive believed to be armed and dangerous, the
25 police exhibited a level of corner cutting that I cannot simply overlook. "Because the
26 prophylaxis of the Fourth Amendment protections is at its zenith with respect to an
27

individual's home, a warrantless search of a private residence is presumptively unreasonable unless one of a few well-delineated exceptions apply." *United States v. Infante*, 701 F.3d 386, 392 (1st Cir. 2012). The government has failed to overcome said presumption in this case. Accordingly, I recommend that the motion to suppress at Docket No. 1391 be **GRANTED**.⁹

This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B) and Rule 72(d) of the Local Rules of this Court. Any objections¹⁰ to the same must be specific and must be filed with the Clerk of Court **within 14 days**. Failure to file timely and specific objections to the report and recommendation is a waiver of the right to appellate review. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Davet v. Maccorone*, 973 F.2d 22, 30–31 (1st Cir. 1992); *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988); *Borden v. Sec'y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987).

IT IS SO RECOMMENDED.

In San Juan, Puerto Rico this 17th day of June, 2024.

S/Héctor L. Ramos-Vega
HÉCTOR L. RAMOS-VEGA
UNITED STATES MAGISTRATE JUDGE

⁹ I certainly expect the government will object to my recommendation. In so doing, the government is ordered to list of items seized from the apartment it has indicated would not be used as part of its case in chief. The presiding District Judge should have the benefit of said list in case she was inclined to reject my recommendation.